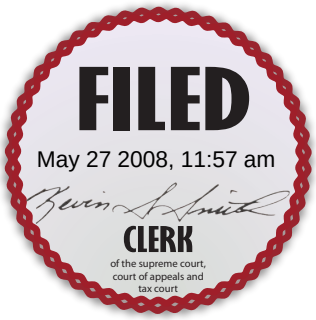

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IN THE COURT OF APPEALS OF INDIANA

VICTOR VEGA TORRES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0708-CR-385
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Kathleen Sullivan, Judge Pro Tempore
Cause No.45G01-0609-FA-53

May 27, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a guilty plea, Victor Torres appeals his sentence for child molesting, a Class C felony. On appeal, Torres raises one issue, which we restate as whether Torres's statutory maximum sentence of eight years, with two years suspended to probation, is inappropriate in light of the nature of the offense and his character. Concluding the sentence is inappropriate, we reverse and remand with instructions that the trial court enter a five-year sentence, with one year suspended to probation.

Facts and Procedural History[1]

At some point between August 1, 2004, and July 1, 2005, B.D., who was either five or six years old,[2] spent the night at his grandfather's home in East Chicago. Torres also spent the night there. According to the probable cause affidavit, on one occasion that night B.D. refused Torres's request that B.D. "get close to him." Appellant's Appendix at 9. Later that evening, B.D. went to sleep on a couch in the living room wearing a t-shirt and blue jeans. Some time later, B.D. awoke in the nude to find Torres sucking on his "private area." Id. When Torres realized B.D. was awake, he ceased and helped B.D. put his clothes back on. B.D. reported these events to his mother, who in turn filed a police report on April 14, 2006.

On September 20, 2006, the State charged Torres with child molesting as a Class A

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[1] We heard oral argument on April 8, 2008, at Ivy Tech Community College in Lafayette, Indiana. We thank counsel for their presentations, and extend our gratitude to Ivy Tech's students, faculty, and administration for their hospitality.

[2] B.D.'s birth date is December 6, 1998.

felony and child molesting as a Class C felony.[3] On May 24, 2007, the parties entered into a plea agreement pursuant to which Torres agreed to plead guilty to child molesting as a Class C felony and the State agreed to dismiss the charge of child molesting as a Class A felony. Sentencing was left to the trial court's discretion, and the parties stipulated to a factual basis that differed slightly from the probable cause affidavit. Specifically, the stipulated factual basis omitted that Torres sucked on B.D.'s "private area," appellant's app. at 9, and stated instead that Torres fondled B.D.'s penis "with the intent to arouse or satisfy his own sexual desires or those of the victim," id. at 38, thus reducing the offense to a Class C felony.

On the same day the parties entered into the plea agreement, the trial court accepted Torres's guilty plea and scheduled a sentencing hearing for July 10, 2007. At the sentencing hearing, the trial court received documentary evidence that included Torres's mental health records and heard testimony from Torres's mother, B.D.'s mother, and Torres. On the same day, the trial court entered an order finding that Torres's guilty plea, history of mental illness, and status as a victim of child abuse were mitigating circumstances and that Torres's criminal history, which included two convictions of criminal recklessness as Class A misdemeanors, and B.D.'s age were aggravating circumstances. The trial court also found that "each aggravating factor, standing alone, outweighs any mitigating factor." Id. at 41. Based on these findings, the trial court sentenced Torres to the statutory maximum of eight years, with

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[3] The elements distinguishing child molesting as a Class A felony and child molesting as a Class C felony are that the former require that the defendant be at least twenty-one years of age and that the defendant perform or submit to sexual intercourse or deviate sexual conduct, while the latter does not require that the defendant be at least twenty-one years of age, but does require that the defendant perform or submit to

two years suspended to probation. Torres now appeals.

Discussion and Decision

I. Standard of Review[4]

This court has authority to revise a sentence "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We may "revise sentences when certain broad conditions are satisfied," Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005), and we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed," Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). In determining whether a sentence is inappropriate, we examine both the nature of the offense and the character of the offender. See Payton v. State, 818

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fondling or touching with intent to arouse or to satisfy either the victim's or the defendant's sexual desires. See Ind. Code §§ 35-42-4-3(a) and (b).

[4] The State argues that this court's review under Appellate Rule 7(B) should be "very deferential" to the trial court, appellee's brief at 4 (quoting Golden v. State, 862 N.E.2d 1212, 1218 (Ind. Ct. App. 2007), trans. denied.), and that we should exercise our authority to revise sentences with "great restraint," id. (quoting Bennett v. State, 787 N.E.2d 938, 949 (Ind. Ct. App. 2003), trans. denied.). This argument overlooks our admonition in Stewart v. State, 866 N.E.2d 858, 865 (Ind. Ct. App. 2007), that the State should "discontinue citing earlier cases from this court stating that our review of sentences under Rule 7(B) is 'very deferential' to the trial court and that we exercise our authority to revise sentences 'with great restraint.'" See also id. at 866 ("We disavow cases such as [Martin v. State, 784 N.E.2d 997 (Ind. Ct. App. 2003) and Foster v. State, 795 N.E.2d 1078 (Ind. Ct. App. 2003), trans. denied,] to the extent they suggest excessive deference to the trial court under Rule 7(B), which clearly conflicts with the current, more vigorous approach to revising sentences that a majority of our supreme court has adopted."); but see Hollin v. State, 877 N.E.2d 462, 466 (Ind. 2007) (Dickson, J., concurring and dissenting) ("Appellate sentence modifications [under Rule 7(B)] should be extraordinary events that almost never occur."). We reiterate the admonition in Stewart, but recognize that the State is not entirely at fault for characterizing our standard of review as one of substantial deference to the trial court, as several unpublished decisions from this court since Stewart was decided have stated the standard as such, specifically citing Martin or Foster in support. See, e.g., Gibson v. State, 2007 WL 2850561, at *2 (Ind. Ct. App., Oct. 3, 2007); Vausha v. State, 2007 WL 2595427, at *6 (Ind. Ct. App., Sept. 11, 2007), trans. denied; Koscher v. State, 2007 WL 1630585, at *3 (Ind. Ct. App., June 7, 2007).

N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When making this examination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied; cf. McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) ("[I]nappropriateness review should not be limited, however, to a simple rundown of the aggravating and mitigating circumstances found by the trial court."); Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006) ("We will assess the trial court's recognition or nonrecognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed here was inappropriate." (emphasis added)). However, "a defendant must persuade the appellate court that his or her sentence has met this inappropriateness standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

II. Appropriateness of Sentence

The trial court sentenced Torres to eight years, with two years suspended to probation. Thus, Torres received the statutory maximum sentence for a Class C felony. See Ind. Code § 35-50-2-6(a) ("A person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years."); Weaver v. State, 845 N.E.2d 1066, 1072 n.4 (Ind. Ct. App. 2006) (explaining that a defendant's total sentence includes both the executed and suspended portion of the sentence).[5]

[5] The charging information alleged that Torres committed the offense between August 1, 2004, and July 1, 2005. Thus, Torres could have committed the offense before the date the current advisory sentencing scheme became effective. See Anglemyer v. State, 868 N.E.2d 482, 491 n.9 (Ind. 2007) (explaining the advisory sentencing scheme became effective April 25, 2005), clarified on reh'g, 875 N.E.2d 218. If Torres did commit the offense before April 25, 2005, the presumptive sentencing scheme would apply. See

As a corollary to our supreme court's observation that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed," Weiss, 848 N.E.2d at 1072, this court has observed repeatedly that maximum sentences should be reserved for the worst offenses and offenders, see Roney, 872 N.E.2d at 802; Haddock v. State, 800 N.E.2d 242, 248 (Ind. Ct. App. 2003). At the same time, however, reading this observation narrowly "would reserve the maximum punishment for only the single most heinous offense." Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied. Instead, a reviewing court "should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character." Id. With these principles in mind, we turn to the nature of the offense and Torres's character.

A. Nature of the Offense

Torres argues the nature of the offense was not "particularly egregious" because he ceased fondling B.D. when B.D. awoke. Appellant's Brief at 4. Torres's counsel elaborated on this point at oral argument, describing Torres's conduct as "opportunistic" rather than "predatory." Implicit in Torres's first point is that he ceased fondling B.D. because he

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Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007) (explaining that the long-standing rule is that the sentencing statute in effect at the time a crime is committed governs the sentence for that crime). However, because application of either the presumptive or advisory sentencing scheme does not affect our determination of whether Torres's sentence is inappropriate, we will refer to the latter scheme for ease of reference. Cf. Primmer v. State, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006) (declining to decide which statutory scheme applies because "the outcome in this case is the same regardless of which sentencing scheme is applied"), trans. denied.

realized the wrongfulness of his actions. This is a reasonable inference, but it does not foreclose the equally reasonable inference that Torres ceased fondling B.D. for a far less commendable reason, namely, that he realized he might get caught. In the absence of any evidence on this point, we decline to draw an inference one way or the other. Moreover, we are not convinced Torres's conduct is as opportunistic as he claims because the probable cause affidavit states that earlier in the evening B.D. refused Torres's request that B.D. "get close to him." Appellant's App. at 9. Nevertheless, although we reject Torres's specific arguments, we agree generally that there is little in the record to indicate that the nature of the offense was more egregious than is typical.

The State attempts to counter this absence of evidence by pointing out that B.D. was five or six years old at the time of the offense. The State acknowledges that the victim's age is an element of child molesting as a Class C felony, see Ind. Code § 35-42-4-3(b) (stating that the victim must be under fourteen years of age), but appears to argue that where the victim's age is substantially less than the age required to establish criminal liability, the offense is more egregious than is typical.[6] In this respect, we have noted that in the context of determining whether a trial court properly found aggravating circumstances (as opposed to 7(B) review), "[a] trial court may not consider the age of the victim alone as an aggravating

[6] The State also contended at oral argument that the nature of the offense was more egregious than is typical because Torres abused a position of trust. Although we agree with the State that abuse of a position of trust aggravates an offense, see Hart v. State, 829 N.E.2d 541, 544 (Ind. Ct. App. 2005), the trial court did not find that Torres did so, and our review of the record indicates that evidence of Torres's relationship with B.D. is too tenuous to attribute Torres's position in the relationship as one that is characterized by trust. See, e.g., Appellant's App. at 49 (Torres's mother's testimony during the sentencing hearing that she and Torres had known B.D. and his mother for "years" and that she and Torres would visit them occasionally); id. at 51-52 (B.D.'s mother's testimony during the sentencing hearing that she knew Torres through her parents).

circumstance when age is a material element of a crime, but must consider the 'particularized circumstances' of the case." Davis v. State, 796 N.E.2d 798, 807 (Ind. Ct. App. 2003), trans. denied.

Our review of the record, however, does not reveal any "particularized circumstances" relating to B.D.'s age that indicate the offense was more egregious than is typical. Indeed, the trial court's finding supports our review, as it found that B.D.'s age was an aggravating circumstance, but did not elaborate further on why it found as such. Cf. McCarthy v. State, 749 N.E.2d 528, 539 (Ind. 2001) (concluding trial court improperly found the victims' ages to be aggravating circumstances because it "did not set forth any particularized circumstance that would justify relying on the victims' ages as aggravating circumstances"). Thus, we are not convinced that B.D.'s age alone renders the nature of the offense more egregious than is typical.

B. Character of the Offender

Torres argues that his guilty plea, history of mental illness, status as a victim of abuse, and history of substance abuse comment favorably on his character. Regarding the latter two points, although the record indicates that Torres's stepfather physically and sexually abused him and that Torres has abused alcohol and drugs to varying degrees over a thirty-year period, neither merit substantial mitigating weight. See Coleman v. State, 741 N.E.2d 697, 700 (Ind. 2000) ("[T]his court has consistently held that evidence of a difficult childhood warrants little, if any, mitigating weight."), cert. denied, 542 U.S. 1057 (2001); Iddings v.

State, 772 N.E.2d 1006, 1018 (Ind. Ct. App. 2002) (indicating that a history of substance abuse may constitute an aggravating circumstance), trans. denied.

Nor do the first two points necessarily bolster Torres's character. A guilty plea generally comments favorably on a defendant's character, see Scheckel v. State, 655 N.E.2d 506, 511 (Ind. 1995), but this court has noted an exception "where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one," Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied. The record indicates that in exchange for Torres's guilty plea, the State agreed to dismiss the charge of child molesting as a Class A felony. Because the sentence for a Class A felony ranges from twenty to fifty years with an advisory sentence of thirty years, see Ind. Code § 35-50-2-4, Torres received a substantial benefit from pleading guilty.

Regarding Torres's history of mental illness, we have stated that a reviewing court must examine four factors in determining the mitigating weight, if any, to assign to the illness: 1) the extent of the defendant's inability to control his or her behavior due to the disorder or impairment; 2) overall limitations on functioning; 3) the duration of the mental illness; and 4) the extent of any nexus between the disorder or impairment and the commission of the crime. Biehl v. State, 738 N.E.2d 337, 340 (Ind. Ct. App. 2000), trans. denied. The evidence in the record concerning the nature and extent of Torres's mental illness comes from the Pre-Sentence Investigation Report ("PSI"), which in turn apparently relied on Torres's medical records and statements he made during an interview with the

probation officer. This evidence, specifically the medical records, discloses that Torres sought mental health treatment from June to August 2005 for substance abuse and anxiety. Torres later sought treatment for post-traumatic stress disorder, depression, and substance abuse from August to September 2006, but discontinued treatment around the time he learned the State filed charges against him. The record also indicates that Torres had psychiatric evaluations after attempting suicide in 1985 and again in 1986. However, notably absent from this evidence is any indication that Torres's history of mental illness rendered him unable to control his behavior, limited his functioning, or, perhaps most important, played a role in his commission of the crime.[7]

Despite our skepticism that the foregoing points comment favorably on Torres's character, there is little in the record beyond the offense itself to condemn his character. The State argues that Torres's criminal history is evidence of Torres's poor character. The record indicates Torres pled guilty to charges of criminal recklessness in March 2001 and again in September 2006, both as Class A misdemeanors.[8] The record does not disclose the factual circumstances pertaining to these offenses, and the statutory definition contemplates a broad

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[7] At oral argument, Torres's counsel conceded there is no direct evidence of a nexus between Torres's history of mental illness and commission of the crime, but invited us to infer a nexus based on evidence that Torres's documented history of mental illness dates back twenty years. We decline Torres's counsel's invitation, and note as an aside that several cases that have revised a sentence under 7(B) based in whole or in part on the defendant's history of mental illness have relied on expert testimony as proof of a nexus. See, e.g., Weeks v. State, 697 N.E.2d 28, 31 (Ind. 1998); Mayberry v. State, 670 N.E.2d 1262, 1271 (Ind. 1996). No such expert testimony was presented here.

[8] The record indicates that in August 2001, Torres also pled guilty to operating a vehicle without a license and violating conditions related to holding a learner's permit, which the PSI lists simply as a misdemeanor and infraction, respectively. However, the State does not argue that these acts comment negatively on Torres's character.

range of conduct. See Ind. Code § 35-42-2-2(b) (stating, among other things, that criminal recklessness as a Class A misdemeanor involves "an act that creates a substantial risk of bodily injury to another person"). Our supreme court has explained that the aggravating weight assigned to a defendant's prior criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." Wooley v. State, 716 N.E.2d 919, 929 (Ind. 1999). Two misdemeanor convictions for criminal recklessness are not sufficiently related in terms of gravity, nature, and number to the current offense of child molesting so as to comment very negatively on Torres's character.

To summarize, nothing in this record convinces us that the nature of the offense or Torres's character justifies the statutory maximum sentence. In making this observation, we do not condone Torres's actions. To the contrary, all offenses of child molesting are monstrous, but they are offenses for which our legislature has prescribed an advisory sentence of four years. Thus, after due consideration of the trial court's decision, we conclude that Torres has sustained his burden of establishing that his statutory maximum sentence of eight years is inappropriate in light of the nature of the offense and his character. We also conclude that an advisory sentence of five years with one year suspended to probation is appropriate.

Conclusion

Torres's sentence is inappropriate in light of the nature of the offense and his character. Accordingly, we remand with instructions that the trial court enter a sentence of five years, with one year suspended to probation.

Reversed and remanded.

FRIEDLANDER, J., concurs.

BRADFORD, J., dissents with opinion.

IN THE
COURT OF APPEALS OF INDIANA

VICTOR VEGA TORRES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0708-CR-385
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

BRADFORD, Judge, dissenting.

Because I cannot agree that Torres's six-year executed sentence with two years suspended to probation is inappropriately harsh, I must respectfully dissent. As an initial matter, I feel compelled to address a question that has generated a split of opinion on this court, namely, whether in this context a fully executed sentence is equivalent to a sentence of equal length but partially suspended to probation. I must respectfully disagree with those of my colleagues who have concluded that the two are equivalent for purposes of an appropriateness challenge.

Common sense dictates that less executed time means less punishment. That is why almost any defendant, given the choice, would gladly accept a partially suspended sentence over a fully executed one of equal length. I agree with Judge Kirsch that "[a] year is, indeed, a year, but a suspended sentence is not the same as an executed sentence[.]" *Eaton v. State*, 825 N.E.2d 1287, 1291 (Ind. Ct. App. 2005) (Kirsch, C.J., dissenting). Almost everyone

would agree that prison is worse than probation, and it is simply not realistic to consider a year of probation, a year in community corrections, and a year in prison as equivalent.

Of course, I acknowledge that probations can be, and often are, revoked, and that the result of those revocations frequently is a fully executed sentence. I agree that "[i]mposition of a suspended sentence leaves open the real possibility that an individual will be incarcerated for some period before being released from his penal obligation." *Weaver v. State*, 845 N.E.2d 1066, 1072 n.4 (Ind. Ct. App. 2006), *trans. denied*. While this is true, as far as it goes, this view seemingly fails to take into account that whether the suspended time is eventually served *depends entirely on the defendant*. The "real possibility" that the suspended portion of a sentence will be ordered executed is not random or dependent on the whim of a judge; a defendant can ensure that it will never become reality simply by abiding by the terms of his probation. In a sense, an eight-year sentence with two years suspended to probation is a six-year sentence with an option for two more, the exercise of which option is entirely up to the defendant.[9] In the end, I believe all would agree that, all else being equal, a six-year executed sentence is less harsh than an eight-year executed sentence. It is just as clear that an eight-year sentence with two years suspended to probation lies somewhere in between, and I would treat it as such for purposes of Rule 7(B) review.

Although I am unaware of any Indiana Supreme Court cases directly on point, I believe that my position is fully consistent with its jurisprudence. In *Hole v. State*, 851

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[9] I do not mean to suggest that living under the terms of probation is not a hardship. Even though probationers are "free," the threat of revocation may be seen by some as the sword of Damocles, an ever-

N.E.2d 302, 304 n.4 (2006), the Court indicated that a discretionary placement in either community corrections or the Department of Correction would be subject to appropriateness review. *Hole*, then, clearly stands for the proposition that the particulars of a sentence can be just as relevant as its length when it comes to Rule 7(B) review. If the difference between prison and community corrections is relevant under 7(B), then it follows that so is the difference between executed time and probation.

Moreover, I believe that *Mask v. State*, 829 N.E.2d 932, 936 (Ind. 2005), in which the Court wrote that "[a] suspended sentence differs from an executed sentence only in that the period of incarceration is delayed unless, and until, a court orders the time served in prison[,]" is distinguishable. First, the Court seems to limit its holding to the context of the case, which was the question of whether suspended time must be included in calculating the longest allowable aggregate sentence under Indiana Code section 35-50-1-2(c). *Id*. ("Incarceration *in the context of subsection (c)* does not mean the period of executed time alone.… We hold that any period of a suspended sentence must be included *when calculating the maximum aggregate sentence under Indiana Code § 35-50-1-2(c)*." (emphases added)). Moreover, *Mask* was decided in a completely different context, one governed by statute and in which the length of the sentence was the only relevant consideration. As *Hole* makes clear, however, length is not the only relevant consideration in appropriateness analysis.

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present threat that prevents them from fully enjoying their "freedom." Even so, I am convinced that most would still prefer probation to incarceration.

Finally, I agree with Judge Sullivan that *Buchanan v. State*, 767 N.E.2d 967, 973 (Ind. 2002), does not stand for the proposition that "sentence" and "punishment" are synonymous, thereby compelling us to treat a sentence of maximum length, fully executed or not, as representing maximum punishment. *See Cox v. State*, 792 N.E.2d 898, 906 (Ind. Ct. App. 2003) (Sullivan, J., dissenting). In *Buchanan*, that question was not before or decided by the Court, and, because the sentence imposed was both the longest allowed *and* ordered fully executed, the two terms *were* interchangeable, at least in that case. I find, however, no indication anywhere in *Buchanan* that the Court intended to equate "sentence" with "punishment" in all contexts and cases. To summarize, my view is that, for purposes of Rule 7(B) review, a maximum sentence is not just a sentence of maximum length, but a *fully executed* sentence of maximum length. Anything less harsh, be it placement in community corrections, probation, or any other available alternative to prison, is simply not a maximum sentence.

Turning to the case before us, and keeping in mind that I do not consider an eight-year sentence with two years suspended to probation to be a maximum sentence, I believe that Torres's sentence is fully justified. The nature of Torres's offense was the molestation of a five- or six-year-old boy staying at his grandfather's home, a place where a child has a right to and should feel safe. The fondling itself was also worse than the typical Class C child molesting, as it involved partially disrobing the victim and fondling B.D.'s bare penis.[10]

[10] Although the probable cause affidavit indicates that B.D. told authorities that Torres put his mouth on his penis, Torres did not stipulate to that and has never otherwise admitted that he did. As such, the allegations contained in the probable cause affidavit do not factor into my analysis.

Given that an over-the-clothing touching that is nowhere near the victim's genitals can also support a Class C felony child molesting, I believe that Torres's offense is clearly worse than typical.

As for Torres's character, I agree with much of what the majority has concluded, namely, that Torres's difficult childhood, guilty plea, and history of mental illness comment favorably on his character. However, I disagree that Torres's criminal history does not comment very negatively on his character. I believe that it tends to show his bad character to the extent that it evidences a lack of respect for the law and his apparent disregard for the safety of others. Both of Torres's prior convictions are for criminal recklessness, which , as the majority notes, involves "an act that creates a substantial risk of bodily injury to another person[,]" Ind. Code § 35-42-2-2(b). Torres's pre-sentence investigation report indicates that he was ordered to, and did, complete a "Gun course" following his 2001 criminal recklessness conviction. Appellant's Green App. p. 107. I infer from this, at the very least, that the sentencing judge saw Torres as a threat to public safety. Moreover, for the reasons I explained above, I believe that the egregious nature of Torres's offense speaks ill of his character. I would therefore hold that Torres's sentence, which, in my view, is less than a maximum sentence, is fully justified, and I would affirm the trial court in all respects.